IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

INCOME TAX APPEAL NO.404 OF 2004

Messrs. Arthur Andersen & Co. Appellants

vs.

The Deputy Commissioner of Income Tax
Special Range 20, Mumbai. Respondents

Mr.Sanjeev M. Shah with Mr.Prakash Shah i/b. M/s.DSK
Legal for the appellants.

Mr.R.V.Desai, senior counsel with Ms.S.V.Bharucha i/b
Mr.P. Kapur for the respondents.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 3rd December 2004

P.C.

Heard Mr.Sanjeev M. Shah, the learned counsel for the appellants. We perused the order of the Deputy Commissioner of Income Tax dated 15th June 1994 passed on the application made by the appellants for a No Objection Certificate for the remittance of the equivalent of US $ 4,87,300 to M/s.Arthur Andersen & Co., Societe Cooperative, a Swiss Co-operative Society (AASC) and the order passed by the Appellate Authority and the Income Tax Appellate Tribunal.

2. The Deputy Commissioner of Income Tax held thus:

" The receipts by AASC, even if it be assumed that they are reimbursements, are nevertheless, reimbursements of business costs defrayed towards providing AAI the following services in India namely:

i) goods or services e.g. publication of brochures through the Communication Division of AASC;

ii) the services of a 'practice director' for several offices in a region/area, AA & Co.India being one of the beneficiary offices/firms;

iii) the managerial services of the managing partner/Chief Executive Officer of the Arthur Andersen Organisation worldwide, whose leadership & guidance benefit AAI;

iv) professional education services for the development & conduct of training programme for staff members of AAI.

Reimbursements of these expenses are held to be the income of AASC within the meaning of the I.T.Act. Whether profits are embodied in this income can only be determined on regular assessment. "

3. In the backdrop of the aforesaid findings the Deputy Commissioner of Income Tax directed the appellants to make the payment of tax at 30% on US $ 4,87,300 before No Objection Certificate could be issued.

4. The appellants preferred appeal before the Commissioner (Appeals) against the order of the Deputy Commissioner of Income Tax dated 15th June 1994. The Commissioner of Income Tax (Appeals) did not agree with the Deputy Commissioner of Income Tax and held that no taxes were required to be deducted from the payments

made by the appellants to AASC and the Assessing Officer was directed to allow the remittances of the payment without deducting the tax on the payments.

5. The revenue was dissatisfied with the order of the Commissioner of Income Tax (Appeals) and preferred the appeal before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal set aside the order of the Commissioner of Income Tax (Appeals) and restored the order of the Assessing Officer. The Income Tax Appellate Tribunal relied upon the judgment of the Supreme Court in the case of Transmission Corporation of A.P. Ltd & Anr. v. Commissioner of Income Tax, (1999) 239 ITR 587. The order passed by the Income Tax Appellate Tribunal is impugned in this income tax appeal.

6. In Transmission Corporation of A.P. Ltd., the Supreme Court with reference to Section 195 of Income Tax Act, 1961 held that the said provision was for tentative deduction of income tax subject to regular assessment and by the deduction of tax, the rights of the parties are not in any manner adversely affected.

The Supreme Court held thus:

> " The scheme of sub-sections (1)(, (2) and (3) of section 195 and section 197 leaves no doubt that the expression "any other sum chargeable under the provisions of this Act" would mean

"sum" on which income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act. The consideration would be-whether payment of the sum to the non-resident is chargeable to tax under the provisions of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum, what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income, if the payment is a trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force. Under the Act, total income for the previous year would become chargeable to tax under section 4. Sub-section (2) of section 4, inter alia, provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted. The sum which is to be paid may be income out of different heads of income provided under section 14 of the Act, that is to say, income from salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources. The scheme of tax deduction at source applies not only to the amount paid which wholly bears "income" character such as salaries, dividends, interest on securities, etc., but also to gross sums, the whole of which may not be income or profits of the recipient, such as payments to contractors and sub-contractors and the payment of insurance commission. It has been contended that the sum which may be required to be paid to the non-resident may only be a trading receipt, and, may contain a fraction of the sum as taxable income. It is true that in some case, a trading receipt may contain a fraction of the sum as taxable income, but in other cases such as interest, commission, transfer of rights of patents, goodwill or drawings for plant and machinery and such other transactions, it may contain a large sum as taxable income under the provisions of the Act. Whatever may be the position, if the income is from profits and gains of business, it would be computed under

the Act as provided at the time of regular assessment. The purpose of sub-section (1) of section 195 is to see that the sum which is chargeable under section 4 of the Act for levy and collection of income-tax, the payer should deduct income-tax thereon at the rates in force, if the amount is to be paid to a non-resident. The said provision is for tentative deduction of income-tax thereon subject to regular assessment and by the deduction of income-tax, the rights of the parties are not, in any manner, adversely affected. Further, the rights of the payee or recipient are fully safeguarded under sections 195(2), 195(3) and 197. The only thing which is required to be done by them is to file an application for determination by the Assessing Officer that such sum would not be chargeable to tax in the case of the recipient, or for determination of the appropriate proportion of such sum so chargeable, or for grant of certificate authorising the recipient to receive the amount without deduction of tax, or deduction of income-tax at any lower rates or no deduction. On such determination, tax at the appropriate rate could be deducted at the source. If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such "sum" to deduct tax thereon before making payment. He has to discharge the obligation of tax deduction at source."

7. The Division Bench of this Court in the case of Commissioner of Income-tax v. Tata Engineering and Locomotive Co.Ltd., 245 ITR 823 relying upon the judgment of the Supreme Court in the case of Transmission Corporation of A.P. Ltd. reiterated the legal position that Section 195 of the Income Tax Act is only for tentative deduction of income tax subject to regular assessment and the rights of the parties are not in any manner adversely affected. With reference to the

facts obtaining therein, the Division Bench held that in view of the observations of the Tribunal that the decision under Section 195(2) cannot be treated as a conclusion of the determination of the income in the case of a foreign company, no substantial question of law can be said to arise. The aforesaid legal position was restated by the Division Bench of this Court in the case of Commissioner of Income-tax v. Elbee Services Pvt.Ltd., 247 ITR 109 thus:

> " The assessee is engaged in the business of providing courier services. The assessee made an application under section 195(2) of the Income-tax Act, 1961, seeking directions from the Assessing Officer to decide as to what portion of remittance made to Universal Parcel Services Worldwide Forwarding Inc., a non-resident company, would constitute income chargeable to tax in India in the hands of the said non-resident company. The Tribunal has come to the conclusion that in the present matter, on facts, no part of the operations were carried out by the non-resident company in India and, accordingly, the Tribunal confirmed the finding of the Commissioner of Income-tax (Appeals). Being aggrieved by the decision of the Tribunal, the present appeal has been preferred by the Department.
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> This appeal has been filed under section 260A of the Income-tax Act, 1961. The appeal is misconceived. No substantial question of law is raised in this appeal. It is well settled that the orders passed under section 195(2) of the Income-tax Act are not conclusive. They do not pre-empt the Department from passing appropriate orders of assessment. We have already taken a view in Income-tax Appeal No.217 of 2000 (CIT v. Tata Engineering and Locomotive Co. Ltd. [2000] 245 ITR 823(Bom)), in which this court has laid down that the findings given under section 195(2) of the Income Tax Act will not preclude the Department from taking a contrary view in the

> assessment proceedings. Hence, no substantial question of law arises."

8. Adverting to the facts of the present case, it would be seen that pursuant to the order passed by the Assessing officer, the present appellants deducted the tax at source from the amount of remittances that was to be made to AASC and then the remittances were made. There is nothing on record to indicate that the recipient viz. AASC disputed that the reimbursement of US $ 4,87,300 by the present appellants was not chargeable to income tax. The learned counsel for the appellants also could not make any definite statement in that regard. Either way, it does not make any difference because the impugned order is only a tentative order for deduction of tax at source subject to the regular assessment. The order passed under section 195(2) as has been consistently held cannot be held to be determining finally the income of the foreign company. In view thereof, the order passed in the present case under section 195(2) cannot and should not be treated as a conclusion in the determination of the income in the case of recipient AASC (foreign company). In the facts and circumstances of the case, therefore, we are satisfied that the impugned order does not give rise to any substantial question of law warranting decision by this Court.

9. The appeal, therefore, does not deserve to be admitted and is dismissed in limine.

(R.M.LODHA,J.)

(J.P. DEVADHAR,J.)